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No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1963

WYCOFF COMPANY, INCORPORATED, APPELLANT

v.

PUBLIC SERVICE COMMISSION OF UTAH, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah (Appendix A, *infra*, pp. 1a-5a) is reported at 389 P. 2d 57. (See also R. 113-114.)[1] No opinion was written by the District Court for Salt Lake County, State of Utah, but its Findings of Fact and Conclusions of Law and Judgment are reproduced in Appendix A, *infra*, pp. 6a-10a, R. 98-103.

JURISDICTION

Appellant brought this action under the Utah Declaratory Judgment Act (9 Utah Code Annotated, 1953, 78-33 et seq.) to declare the Utah Motor Carrier Act, (6 Utah Code Annotated,

[1]Record references are to the typewritten record which is being filed with this jurisdictional statement.

1953, 54-6-1 et seq.) unconstitutional as being repugnant to the United States Constitution. The Supreme Court of the State of Utah upheld the statute.

The judgment below was entered on February 5, 1964 (R. 115). Notice of Appeal was filed in the District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, on May 4, 1964 (affixed to cover of typewritten record). The jurisdiction of this Court rests on 28 U.S.C. 1257 and 2101. *Connecticut General Co.* v. *Johnson*, 303 U.S. 77; *Adams Manufacturing Co. v. Storen*, 304 U.S. 307; *Kern-Limerick, Inc. vs. Scurlock*, 347 U.S. 110.

QUESTION PRESENTED

Whether the exclusions and exceptions of 6 Utah Code Annotated, 1953, 54-6-12, as amended, to the Utah Motor Carrier Act (6 Utah Code Annotated, 1953, 54-6-1 *et seq.*, as amended) create an unlawful discrimination between exempt and nonexempt motor carriers that causes said act to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

STATUTE INVOLVED

The relevant portions of the Utah Motor Carrier Act, as amended (6 Utah Code Annotated, 1953, 54-6-1 *et seq.*) are set forth in Appendix B, *infra*, pp. 11a-*et seq.*

STATEMENT

Appellant brought this action to declare the Utah Motor Carrier Act unconstitutional after the Utah PSC imposed a fine and caused criminal citations to be issued under said Act against appellant and its employees (App. A. *infra* p. 8a). Appellant contended that the Act violates the Equal Protection Clause of the Fourteenth Amendment (App. A, *infra*, p. 9a).

1. THE TRANSACTIONS

Appellant is a common motor carrier of property, operating in the State of Utah, pursuant to certificates of convenience and necessity issued by the respondent, Public Service Commission (PSC) of Utah (R. 44-45). The following allegations in appellant's Complaint in the district court are admitted by PSC:

> That the defendants have threatened to require plaintiff to pay substantial penalties and have caused criminal citations to be issued against plaintiff, and plaintiff's employees, the proceedings under some of which are still pending, for plaintiff's alleged failure to comply with the requirements of Title 54, Chapter 6, Utah Code Annotated 1953 (R. 3).

The allegations were admitted in paragraph 2 of PSC's Answer (R. 17) and were included in the findings of the district court (R. 100). The admitted threats of PSC against appellant, including fines as well as criminal citations pursuant to Sec. 54-6-18 (App. B, *infra*, p. 13a), indicate the basic controversy involved. See also *Wycoff Company, Inc. v. Public Service Commission*, 13 Utah 2d 123, 369 P. 2d 283, where the constitutionality of the Motor Carrier Act was not an issue, as indicated in footnote 5 of the court's opinion (App. A, *infra*, p. 2a). In fact, disputes have been continuous for a number of years. See *Wycoff Company, Inc. v. Utah Public Service Commission* (1950), 119 Utah 342, 227 P. 2d 323; *Wycoff Company, Inc. v. Utah Public Service Commission* (1951), 195 F. 2d 252 (CA-10); *Public Service Commission of Utah v. Wycoff Company, Inc.* (1952), 344 U.S. 237, 97 L. Ed. 291; *Lake Shore Motor Coach Lines v. Bennett, et al, P.S.C.U., Wycoff Company, Inc.* (1958), ... Utah 2d ...., 333 P. 2d 1061.

2. THE UTAH MOTOR CARRIER ACT

Although the Utah Motor Carrier Act makes it mandatory for the PSC to regulate all common motor carriers of property

for hire (App. B, p. 12a), Sec. 54-6-12, UCA 1953, provides that various classes of such motor carriers (therein called "exempt carriers") are subject only to insurance requirements, safety regulations and accident report-making obligations, and therefore need not, among other things, obtain Certificates of Convenience and Necessity, nor comply with tariff and rate-regulation requirements of the Commission. Such exempt carriers are specified to include motor vehicles that carry exclusively the following commodities:

> (a) Any vehicle whose cargo consists exclusively of livestock, farm, orchard, or dairy products which are being transported between farm, orchard or dairy, market, warehouse, creamery or processing plant; or exclusively of farm or dairy supplies used in or about the farm or dairy; or exclusively of coal, lumber or logs which are being transported from mine or forest to shipping point or market.
>
> (b) Any motor vehicle when owned or operated by any duly organized agriculture association used exclusively in the carrying on of its legally authorized nonprofit activities.
>
> (c) Any motor vehicles used exclusively to transport newspapers between the publisher and the distributor and subscriber.
>
> (d) Any motor vehicles specially constructed for towing, wrecking, maintenance, or repair purposes.
>
> (e) Any motor vehicle constructed and used as an armored car to transport money or other valuables; or used as ambulances or hearses.

After the Utah PSC imposed a fine and caused criminal citations to be issued against appellant, the latter filed the instant suit for a determination that the Act was unconstitutional (App. A, *infra*, p. 1a).

3. THE STATE COURT DECISIONS

The District Court of the Third Judicial District of the State of Utah entered judgment that declared the entire Motor Carrier Act (6 UCA 1953, 54-6-1 *et seq.*) was unconstitutional and void under the Fourteenth Amendment of the United States Constitution, as well as of similar provisions of the Utah Constitution. The lower State Court found that the exclusions from the Act were discriminatory and denied to those motor carriers brought within the Act in all particulars, equal protection of the law (App. A. *infra*, pp. 6a-10a).

On appeal, the Supreme Court of Utah reversed, citing only 109 A.L.R. 550, stating:

> We have given careful consideration to classes of transportation exempted under 54-6-12 and conclude that in each instance the classification is reasonable (App. A, *infra*, p. 5a).

THE QUESTION IS SUBSTANTIAL

This appeal presents the question whether Utah may constitutionally exclude "exempt carriers" (described in Sec. 54-6-12, UCA 1953, App. B, *infra*, pp. 13a-14a) from the general regulation of its Public Service Commission.

Sec. 54-6-12, UCA 1953 (App. B, *infra*, p. 13a) provides that "no portion of this act shall apply" to those carriers excluded from general regulation, "Except for the provisions of 54-6-17 relative to the requirements of insurance, 54-6-21, relative to safety regulations, and 54-6-22 relative to accident report." Nonexempt motor carriers, such as appellant, are subject to general regulation, and must obtain, for example, (a) Certificates of Convenience and Necessity (common carriers) after proving that "public convenience and necessity require the proposed service" (Sec. 54-6-5, App. B, *infra*, p. 12a) and (b) Permits (contract carriers) (Sec. 54-6-8, App. B, *infra*, p. 13a), and are regulated, *inter alia*, as to (c) tariffs, rates and schedules (Sec. 54-6-4, App. B, *infra*, p. 12a).

Appellant relies principally upon *Smith v. Cahoon*, 283 U.S. 553, 75 L.Ed. 1264, wherein the Florida motor carrier act was held to be unconstitutional under the Equal Protection Clause. The Florida Act involved completely excluded from regulation the following motor carrier operations:

> . . . corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transportation of agricultural, horticultural, dairy, or other farm products with fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city. 283 U.S. at 557; 75 L.Ed. at 1269.

Although since 1957 "exempt carriers" in Utah may have to comply with insurance, safety regulations and the making of accident reports the same as regulated carriers, the latter must comply with the weightier matters upon which the genesis and survival of a motor carrier depend: namely, authority to operate, rates to be charged; routes to be used; commodities that can be hauled; schedules to be maintained, and numerous other obligations of a public utility. An unconstitutional ambiguity also exists in the conflicting definitions of "common," "contract," (includes all except common carriers); and "exempt" carriers. (Compare 54-6-1 with 54-6-12.) The Supreme Court in *Smith v. Cahoon* held that the exclusions quoted above made the entire Florida statute invalid on its face.

As the Utah District Court held –

> . . . the classes of motor carriers excepted from general regulation under the Act . . . do not constitute a reasonable classification, and such classification is arbitrary, capricious and unjustly discriminatory, not having a reasonable relation to objects of this legislation (App. A, *infra*, p. 8a).

As to the purpose and controlling principles of the Utah Motor Carrier Act, *Mulcahy v. Public Service Commission*, 101 Utah 245, 261, 117 P.2d 298, 305 and *Utah Light & Traction Company v. Public Service Commission*, 101 Utah 99, 113, 118 P.2d 683, 690 state:

> The paramount consideration is the benefit to the public, the promotion and advancement of its growth and welfare.

In upholding the constitutionality of the Act, the State Supreme Court (App. A, *infra*, p. 1a) did not discuss what, in our judgment, was the fatal defect in the Florida statute: the fact that exempt carriers need not obtain *certificates* of authority, whereas regulated carriers must. *Smith v. Cahoon* emphasizes both the discrimination as to obtaining authority and providing public liability indemnity when it states:

> ". . . . we think that the discrimination it (the Florida Act) makes between the private carriers which are relieved of the necessity of obtaining *certificates* and giving security, and a carrier such as the appellant was wholly arbitrary. . . . Such a classification is not based on anything having relation to the purpose for which it is made." (75 L.Ed. 1264, 1274.)

The Utah Act still discriminates in its certificate requirements. Whether this discrimination, with all of its attendant implications – including what can and cannot be hauled lawfully – is an unconstitutional denial of equal protection of the laws, is the ultimate question in this appeal.

The Utah Supreme Court sidestepped this question. In our view this is a distinction of substance which has been recognized. *Sproles v. Binford* 286 U.S. 374, 394, 76 L.Ed. 1167, 1182, specified that it was ". . . not a case of an arbitrary discrimination between the products carried, as in the case of Smith v. Cahoon, 283 U.S. line 53, 567, 75 L.Ed. 1264, 1274, 51 S.Ct. 582." Litigation subsequent to *Smith v. Cahoon* has never decided this question. See *Continental Baking Co. vs. Wood-*

ring, 286 U.S. 352, 76 L.Ed. 1155, 1166 involving limited exceptions; *Hicklin vs. Coney*, 290 U.S. 169, 78 L.Ed. 247, 250 which noted at 78 L.Ed. 251, "The exemptions in the instant case are not as limited as that in Continental Baking Co. vs. Woodring, but they differ materially from that found to be objectionable in Smith v. Cahoon . . ;" also *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 79 L.Ed. 1439, 1444, "The case is a (sic) very different from Smith v. Cahoon"; and, at 79 L.Ed. 1445 with further reference to Smith v. Cahoon, ". . . exemption from a tax stands upon a different footing"; and *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 79 L.Ed. 281, referring to the same case, observed ". . . the statute may show on its face that the classification is arbitrary."

Every State, except Delaware and Hawaii, regulates transportation, for hire, by motor vehicles; and most States exclude or exempt some commodities from regulation. The exceptions are all catalogued in Appendix C, *infra*, which reproduces a study made of all the States in an Amicus Curiae brief filed in the Utah Supreme Court (R. 112, pp. 17-26 therein). This study makes evident that the discrimination in the Utah Act is worse than in most states, although the problem is not limited to Utah.

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

WAYNE C. DURHAM
Attorney for Wycoff Company, Incorporated

June, 1964.

APPENDIX A

Opinion of the Supreme Court of the State of Utah

WYCOFF COMPANY, INCORPORATED, PLAINTIFF AND RESPONDENT

v.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, ET AL., ITS COMMISSIONERS, DEFENDANTS AND APPELLANTS

UTAH MOTOR TRANSPORT ASSOCIATION, AMICUS CURIAE

CALLISTER, *Justice*:

In an action for declaratory judgment the lower court held unconstitutional the Utah Motor Carrier Act.[1] That court held that the exemptions provided in the Act were discriminatory to those motor carriers, not exempt, and denied them the equal protection of the laws guaranteed by Amendment XIV of the U. S. Constitution[2] and Article I, Section 7 of the Utah State Constitution.[3] From this judgment the Utah Public Service Commission appeals.

The Commission upon this appeal makes the contentions that the respondent (herein referred to as Wycoff), being a licensed carrier, is estopped to challenge the constitutionality of the act in question, having been the recipient of its benefits, and that it is not in a position to question the validity of the Act because it has not been harmfully affected by its terms. With these contentions we do not concern ourselves because of the disposition of the case upon other and more fundamental grounds renders them moot.

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[1] Ch. 6, Title 54, U. C. A. 1953.

[2] ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

[3] "No person shall be deprived of life, liberty or property, without due process of law."

The Motor Carrier Act provides that it is a misdemeanor to violate any of its provisions and further provides for fines and other penalties to be imposed upon a violator.[4] Because of certain violations of the Act, the Commission imposed a fine upon Wycoff, a licensed common carrier, which action was upheld by this court.[5] Subsequently, the Commission commenced proceedings in the District Court of Salt Lake County to collect the fine. This matter is still pending, awaiting the outcome of this declaratory judgment action.

In the instant case, the lower court held that the exemption provisions of 54-6-12, U.C.A. 1953,[6] as amended, were dis-

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[4] 54-7-25, 26, 27 and 28, U. C. A. 1953.

[5] Wycoff Co. v. Public Service Commission, 13 Utah 2d 123, 369 P. 2d 283 (1962). The constitutionality of the Act was not an issue.

[6] "Exceptions from provisions of act – Public liability and property damage policies – Rules and regulations – Supervision of carriers excepted. – Except for the provisions of 54-6-17 relative to requirements of insurance, 54-6-21, relative to safety regulations, and 54-6-22 relative to accident report no portion of this act shall apply:

"(a) To motor vehicles when engaged exclusively in transporting students or their instructors to or from school or to or from school activities, the word 'school' to be construed to mean a place or structure in which the annual winter or summer elementary, collegiate, university or religious instruction is carried on; or

"(b) To motor vehicles when used exclusively in carrying the United States mail under contract with the federal government; or

"(c) To motor vehicles when the cargo consists exclusively of livestock, farm, orchard, or dairy products which are being transported between farm, orchard or dairy and a market, warehouse, creamery or processing plant; or exclusively of farm or dairy supplies used in or about the farm or dairy; or exclusively of coal, lumber or logs which are being transported from mine or forest to shipping point or market; or

"(d) To motor vehicles when owned or operated by any duly organized agriculture co-operative association and used exclusively in the carrying on of its legally authorized nonprofit activities; or

"(e) To motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors; or

"(f) To motor vehicles when especially constructed for towing, wrecking, maintenance, or repair purposes, and not otherwise used in transporting goods and merchandise for compensation; or when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables, or when used as hearses, ambulances, or licensed taxicabs, operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral

criminatory and rendered the whole Act unconstitutional and void. If the lower court were right, the imposition of the fine would also be void.

In support of the lower court's decision, Wycoff relies principally on Smith v. Cahoon.[7] In that case a private motor carrier was arrested for failure to obtain a certificate of convenience and necessity and pay a mileage tax as required

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director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

"(g) To a group of employees riding together in the automobile of a fellow employee to and from their employment and sharing the actual expenses of the transportation; provided that said group of employees shall not exceed five persons, in addition to the driver of the vehicle, and in no event to exceed three persons in any one seat, and provided further that this subsection shall not apply to any individual so operating in excess of one motor vehicle.

"It shall be unlawful for any vehicle which is operated under any of said exempt classes to be operated upon the public highways of this state, for hire, without a public liability policy in an amount not less than $20,000 for personal injuries to or death of one person, or less than $40,000 for injuries to or death of more than one person; and for damage to property of any person other than the assured in an amount not less than $10,000 for liability arising out of the operation of said vehicle for hire; without maintaining said vehicle and all parts thereof in a safe condition at all times and without reporting every accident arising from or in connection with the operation of such vehicle as required by law or to be operated for any uses or purposes not falling within said exempt classes, except in accordance with the provisions of this act.

"The commission shall have power and authority to prescribe such reasonable rules and regulations to carry out the purposes of this act as may be deemed necessary including the establishing of reasonable fees for registration and each annual renewal thereof of exempt carriers and for the services performed by the commission.

"The commission is vested with power and authority and it shall be its duty to supervise and regulate all motor carriers as excepted above in accordance with these rules and regulations and with the provisions of this section and all carriers now operating under the provisions of this section shall make application to register their operation with the public service commission on or before July 1, 1957, and thereafter each carrier commencing operations under this section shall apply for registration as provided herein within thirty days immediately after said operation.

"A violation of this section or of the rules established pursuant thereto shall constitute an unlawful act and shall be punishable in the same manner and to the same extent as provided for in this act for nonexempt carriers."

[7] 283 U. S. 553, 75 L. Ed. 1264; 51 S. Ct. 582 (1931).

by a Florida statute[8] which applied to "all transportation companies" without making any distinction between common carriers and private or contract carriers. The Florida Supreme Court upheld the constitutionality of the statute, holding that its provisions which were "legally applicable" only to common carriers, were not applicable to private carriers. It did not attempt to designate which these were other than to say that a private carrier must procure the certificate and pay the tax.[9] Upon appeal the United States Supreme Court reversed, holding that since no line of severance of provisions was indicated on its face, the statute applied in toto to all within its scope and that it is beyond the power of a state by legislative fiat to convert a private carrier into a common carrier. Thus, the "due process" clause of the Fourteenth Amendment to the United States Constitution was violated.

The foregoing constitutional objections are not involved in the instant case. However, in Smith v. Cahoon, the Supreme Court also held that the exemptions contained in the Florida statute were discriminatory and violative of the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States. The Florida statute exempted from *all* its provisions auto transportation companies engaged exclusively in the transportation of agricultural, horticultural, dairy, farm products, etc. One of the statutory provisions from which they were exempt was that requiring an auto transportation company to furnish a bond or insurance policy to afford security for the public against injuries as well as for the protection of persons and property transported.

The Supreme Court recognized the principle that a state has broad discretion in classification in the exercise of its power of regulation, but stated:

> "In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally in order to be sustained, must be

[8] Laws of Florida, 1929, Ch. 13700.
[9] Cahoon v. Smith, 99 Fla. 1174, 128 So. 632 (1930).

> deemed to relate to the public safety. . . . So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of appellant's constitutional right. . . ."[10]

The possibility of a like discrimination in the Utah Motor Carrier Act was removed by the legislature in 1957 when it adopted an amendment to 54-6-12, U.C.A. 1953[11] requiring the enumerated exempt carriers to provide insurance, comply with safety regulations, and to comply with the provisions relative to accident reports.[12]

We have given careful consideration to classes of transportation exempted under 54-6-12 and conclude that in each instance the classification is reasonable. For the most part, the transportation exempted is casual, seasonal, slow-moving, not on regular routes or schedules, frequently in special equipment, and for comparatively short distances. Each of the exemptions have been held reasonable by other courts.[13]

Reversed. No costs awarded.

WE CONCUR: F. Henri Henriod, C. J., Roger I. McDonough, J., J. Allan Crockett, J., Lester A. Wade, J.

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[10] 283 U. S. 553, 567.

[11] Laws of Utah 1957, Ch. 107.

[12] Prior to this amendment, the District Court for Salt Lake County in 1953 had held the Motor Carrier Act unconstitutional (Newman v. Public Service Commission, Civil No. 92815). The appeal to this court was dismissed upon application of the Commission.

[13] See 109 A.L.R. 550.

Finding of Fact and Conclusions of Law and Judgment of the District Court of the Third Judicial District of the State of Utah.

Civil No. 181,801

WYCOFF COMPANY, INCORPORATED, PLAINTIFF,

v.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING AND JESSE R. S. BUDGE, ITS COMMISSIONERS, DEFENDANTS

The above-entitled cause came on regularly for trial before the Honorable Merrill C. Faux, sitting without a jury, on the 4th day of February, 1963, pursuant to a pre-trial order entered on January 21, 1963. Plaintiff was represented by WAYNE C. DURHAM, Esq., and the defendants were represented by the Attorney General of the State of Utah, appearing by RAYMOND W. GEE, Esq., Chief Assistant Attorney General, and by KEITH E. SOHM, Esq., Commerce Attorney, Public Service Commission of Utah.

At the pre-trial hearing, counsel for the respective parties agreed that there were no factual issues to be resolved and that the question of constitutionality could be determined based upon the written briefs on file, supplemented by oral argument. On February 4, 1963, this Court fully heard the oral arguments of counsel, considered the pleadings, the written briefs, and being fully advised in the premises, took the matter under advisement and now makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This action is for a Declaratory Judgment brought pursuant to Title 78, Chapter 33, Utah Code Annotated, 1953.

2. Plaintiff is a Utah corporation holding Certificates of Public Convenience and Necessity Nos. 1162, 1162-Sub 1, and 1162-Sub 2, issued by the defendant, Public Service Commission of Utah, hereinafter called "Commission," authorizing transportation for hire by motor vehicle, as a common carrier, between points and places within the State of Utah.

3. That although Title 54, Chapter 6, Utah Code Annotated, 1953, as amended, purports to regulate all motor vehicles carrying passengers or property for hire, Section 54-6-12, Utah Code Annotated, 1953, provides that various classes of such motor vehicles so engaged, need not obtain Certificates of Convenience and Necessity, nor comply with tariff and rate-regulation requirements of the Commission, provided that said motor vehicles carry certain types of property, including the following:

> (a) Any vehicle whose cargo consists exclusively of livestock, farm, orchard, or dairy products which are being tranported between farm, orchard or dairy, market, warehouse, creamery or processing plant; or exclusively of farm or dairy supplies used in or about the farm or dairy; or exclusively of coal, lumber or logs which are being transported from mine or forest to shipping point or market.
>
> (b) Any motor vehicle when owned or operated by any duly organized agriculture association used exclusively in the carrying on of its legally authorized nonprofit activities.
>
> (c) Any motor vehicles used exclusively to transport newspapers between the publisher and the distributor and subscriber.
>
> (d) Any motor vehicles specially constructed for towing, wrecking, maintenance, or repair purposes.

(e) Any motor vehicle constructed and used as an armored car to transport money or other valuables; or used as ambulances or hearses.

4. That a violation of this Act constitutes a misdemeanor for which the person violating may be fined and/or incarcerated. Sections 54-7-25, -26, -27, and -28, also provide other fines and penalties.

5. That the defendants have threatened to require plaintiff to pay substantial penalties and have caused criminal citations to be issued against plaintiff, and plaintiff's employees, some of which proceedings are still pending, for plaintiff's alleged failure to comply with the requirements of Title 54, Chapter 6, Utah Code Annotated, 1953.

6. That the classes of motor carriers excepted from general regulation under the Act as provided in Section 54-6-12, Utah Code Annotated, 1953, do not constitute a reasonable classification, and such classification is arbitrary, capricious and unjustly discriminatory, not having a reasonable relation to the public welfare or to the purposes and objects of this legislation.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. That the exclusion provisions of the statute which, as set out in Section 54-6-12, Utah Code Annotated, 1953, exempt from general application of the Act and from the jurisdiction of the Public Service Commission (except as to requirements of insurance, safety regulations and accident reports), those motor carriers engaged in transportation for nonprofit agriculture associations; or those motor carriers transporting, for hire, farm, orchard, or dairy products; livestock, farm, or dairy supplies used on or about farms or dairies; coal, lumber, logs, newspapers, money or valuables, are discriminatory and deny to those carriers brought within the Act in all particulars, the

equal protection of the laws as guaranteed by Amendment XIV of the Constitution of the United States of America, and Article I, Section 7 of the Constitution of the State of Utah.

2. That Title 54, Chapter 6, Utah Code Annotated, 1953, as amended, is unconstitutional and void.

Dated this 15th day of April, 1963.

/s/ MERRILL C. FAUX
District Judge

Civil No. 131,801

WYCOFF COMPANY, INCORPORATED, PLAINTIFF

v.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING AND JESSE R. S. BUDGE, ITS COMMISSIONERS, DEFENDANT

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Merrill C. Faux, sitting without a jury, on the 4th day of February, 1963, pursuant to a pre-trial order entered on January 21, 1963. Plaintiff was represented by WAYNE C. DURHAM, Esq., and the defendants were represented by the Attorney General of the State of Utah, appearing by RAYMOND W. GEE, Esq., Chief Assistant Attorney General, and by KEITH E. SOHM, Esq., Commerce Attorney, Public Service Commission of Utah.

At the pre-trial hearing, counsel for the respective parties agreed that there were no factual issues to be resolved and that the question of constitutionality could be determined based upon the written briefs on file, supplemented by oral argument. On February 4, 1963, this Court fully heard the oral arguments of counsel, considered the pleadings, the written briefs, and being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Title 54, Chapter 6, Utah Code Annotated, 1953, as amended, is hereby declared to be in violation of Amendment XIV of the Constitution of the United States of America and Article I, Section 7 of the Constitution of the State of Utah, and that said Title 54, Chapter 6, Utah Code Annotated, 1953, as amended, is unconstitutional and void.

Dated this 15th day of April, 1963.

/s/ MERRILL C. FAUX
District Judge

APPENDIX B

The pertinent portions of the Utah Motor Carrier Act, as amended, 6 Utah Code Annotated, 54-6-1 *et seq.*, are as follows:

54-6-1. WORDS AND PHRASES DEFINED. Certain words and phrases used in this act, unless contrary to or inconsistent with the context, are defined as follows:

. . . . . .

"Common motor carrier of property" means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him.

. . . . . .

"Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property for hire and not included in the term common motor carrier of property as hereinbefore defined.

54-6-2. ALL MOTOR CARRIERS SUBJECT TO REGULATION AS COMMON CARRIERS. All common motor carriers of property or passengers as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

54-6-3. TRANSPORTING FOR COMPENSATION ON PUBLIC HIGHWAYS. No common or contract motor carrier shall operate any motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

54-6-4. COMMON MOTOR CARRIERS—POWERS AND DUTIES OF COMMISSION. The commission is vested with power and authority, and it shall be its duty, to supervise and regulate all common motor carriers and to fix, alter, regulate and determine just, fair, reasonable and sufficient rates, fares, charges and classifications; to regulate the facilities, accounts, service and safety of operations of each such common motor carrier, to regulate operating and time schedules so as to meet the needs of any community, and so as to insure adequate transportation service to the territory traversed by such common motor carriers, and so as to prevent unnecessary duplication of service between these common motor carriers, and between them and the lines of competing steam and electric railroads; and the commission may require the coordination of the service and schedules of competing common carriers by motor vehicles or electric and steam railroads; to require the filing of annual and other reports, tariffs, schedules and other data by such common motor carriers in all matters affecting the relation between such common motor carriers and the public and between such common motor carriers and other common carriers, to the end that the provisions of this chapter may be fully and completely carried out. . . .

. . .

54-6-5. INTRASTATE COMMERCE—CERTIFICATE OF CONVENIENCE AND NECESSITY. It shall be unlawful for any common motor carrier to operate as a carrier in intrastate commerce within this state without first having obtained from the commission a certificate of convenience and necessity.

. . .

54-6-8. CONTRACT CARRIER – INTRASTATE COMMERCE – PERMIT. It shall be unlawful for any contract motor carrier to operate as a carrier in intrastate commerce without having first obtained from the commission a permit therefor.

54-6-12. EXCEPTIONS FROM PROVISIONS OF ACT – PUBLIC LIABILITY AND PROPERTY DAMAGE POLICIES – RULES AND REGULATIONS – SUPERVISION OF CARRIERS EXCEPTED. Except for the provisions of 54-6-17 relative to requirements of insurance, 54-6-21, relative to safety regulations, and 54-6-22 relative to accident report no portion of this act shall apply:

(a) To motor vehicles when engaged exclusively in transporting students or their instructors to or from school or to or from school activities, the word "school" to be construed to mean a place or structure in which the annual winter or summer elementary, collegiate, university or religious instruction is carried on; or

(b) To motor vehicles when used exclusively in carrying the United States mail under contract with the federal government; or

(c) To motor vehicles when the cargo consists exclusively of livestock, farm, orchard, or dairy products which are being transported between farm, orchard, or dairy and a market, warehouse, creamery or processing plant; or exclusively of farm or dairy supplies used in or about the farm or dairy; or exclusively of coal, lumber or logs which are being transported from mine or forest to shipping point or market; or

(d) To motor vehicles when owned or operated by any duly organized agriculture cooperative association and used exclusively in the carrying on of its legally authorized nonprofit activities; or

(e) To motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors; or

(f) To motor vehicles when especially constructed for towing, wrecking, maintenance, or repair purposes, and not otherwise used in transporting goods and merchandise for compensation; or when constructed as armored cars and used for the safe conveyance or delivery of money or other valuables, or when used as hearses, ambulances, or licensed taxicabs, operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

(g) To a group of employees riding together in the automobile of a fellow employee to and from their employment and sharing the actual expenses of the transportation; provided that said group of employees shall not exceed 5 persons, in addition to the driver of the vehicle, and in no event to exceed 3 persons in any one seat, and provided further that this subsection shall not apply to any individual so operating in excess of one motor vehicle.

It shall be unlawful for any vehicle which is operated under any of said exempt classes to be operated upon the public highways of this state, for hire, without a public liabiilty policy in an amount not less than $20,000.00 for personal injuries to or death of one person, or less than $40,000.00 for injuries to or death of more than one person; and for damage to property of any person other than the assured in an amount not less than $10,000.00 for liability arising out of the operation of said vehicle for hire, without maintaining said vehicle and all parts thereof in a safe condition at all times and without reporting every accident arising from or in connection with the operation of such vehicle as required by law or to be operated for any uses or purposes not falling within said *exempt classes*, except in accordance with the provisions of this act.

The commission shall have power and authority to prescribe such reasonable rules and regulations to carry out the purposes

of this act as may be deemed necessary including the establishing of reasonable fees for registration and each annual renewal thereof of *exempt carriers* and for the services performed by the commission.

The commission is vested with power and authority and it shall be its duty to supervise and regulate all motor carriers as excepted above in accordance with these rules and regulations and with the provisions of this section and all carriers now operating under the provisions of this section shall make application to register their operation with the public service commission on or before July 1, 1957, and thereafter each carrier commencing operations under this section shall apply for registration as provided herein within 30 days immediately after said operation.

A violation of this section or of the rules established pursuant thereto shall constitute an unlawful act and shall be punishable in the same manner and to the same extent as provided for in this act for non-exempt carriers.

54-6-18. VIOLATING PROVISIONS OF ACT A MISDEMEANOR. Every carrier to which this act applies and every person who violates or who procures, aids or abets in the violating of any provisions of this act, or who fails to obey any lawful order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor.

54-6-21. SAFETY REGULATION. Every motor vehicle and all parts thereof shall be maintained in a safe condition at all times and shall be at all times subject to inspection by the commission or its duly authorized representatives.

54-6-22. ACCIDENT REPORTS. Every accident arising from, or in connection with, the operation of any motor vehicle to which this act applies shall be reported to the commission in such detail and in such manner as the commission may require.

APPENDIX C

State by state list of exemptions of the persons, type of vehicles, persons or corporations operating vehicles and commodities which are exempt.

Alabama

Agricultural commodities, cooperative associations, hotel vehicles, school busses, U.S. mail, newspapers, magazines, ambulances, hearses, milk, livestock, coal, logs, lumber, poles, pulpwood, cotton in bales, cotton seed, fertilizer and peanuts or potatoes. (Alabama Code Title 48, Section 301)

Alaska

United States mail, newspapers and periodicals. (Alaska Motor Freight Carrier Act, Section 5 (1)

Arizona

School busses. (Arizona R. S. Section 40-602)

Arkansas

Livestock, unprocessed fish, unprocessed agricultural commodities, baled cotton, cottonseed, cottonseed meal, cottonseed hulls, cottonseed cake, soybean meal, commercial fertilizer, agricultural cooperative associations, taxicabs, school busses. (Arkansas Act No. 397, Acts 1955 Sec. 5 (b))

California

Agricultural or horticultural cooperative organizations, school busses and a farmer transporting livestock, agricultural commodities or supplies. (California Public Utilities Code Secs. 220, 226, 3511 and 3911 (c))

Colorado

Farmers transporting (1) livestock, (2) agricultural commodities, or (3) supplies, school busses, tow trucks, hearses and ambulances. (Colorado Revised Statutes, Sections 115-9-25 115-11-22, 115-10-32, 115-11-2 and 115-9-4)

Connecticut

Fertilizer, tree or plant spraying materials, farmer vehicles, cooperative marketing corporations, newspapers, armored cars. (Connecticut Statutes, Sec. 16-282)

Delaware

No special statutory provisions.

Florida

Agricultural or horticultural products, fertilizers, sprays, fish, oysters, shrimp, dairy products, ice; taxicabs, hotel busses, race horses, school busses, dump trucks, logs, lumber, forest products. (Florida Statutes, Sec. 323.29)

Georgia

Agricultural products, fruit, livestock, meats, fertilizer, wood, lumber, cotton, poultry, eggs, fish, oysters, timber, logs, peanuts in the shell, peaches, taxicabs, hotel vehicles, school busses, U.S. mail. (Georgia Code Sec. 68-502)

Hawaii

Hawaii has no motor carrier act.

Idaho

Agricultural products, supplies to farm, taxicabs, hotel vehicles, school busses, newspapers, U.S. mail, forest products and products of the mine. (Idaho Code Sec. 61-801)

Illinois

Agricultural supplies, livestock, agricultural products, or commodities, farm or dairy products, livestock, poultry, fruits, cooperative associations, U.S. mail, agricultural machinery and tow trucks. (Illinois Revised Statutes Chapter 95 1/2 Sec. 282.3)

Indiana

Livestock, agricultural commodities, supplies to farm, cooperative associations, taxicabs, school busses, U.S. mail, armored cars, fertilizers. (Indiana Statutes, Section 47-1213)

Iowa

School busses, liquid products in bulk in certain instances, agricultural limestone, sand, gravel and stone. (Iowa Code Sec. 325.1, Sec. 327.1 and Laws of 1957, S. B. 167 Section 16)

Kansas

Grain, owners of livestock or farm products, school busses, U.S. mail, hearses, funeral coaches, ambulances and dump trucks. (Kansas G. S. Section 66-1, 109)

Kentucky

Agricultural, dairy products, livestock, meat, fruit, fertilizer, wood, lumber, cotton, products of grove or orchard, poultry, eggs, frozen fish, airplanes, automobiles and trucks, barrels, beer, blocks, boats, brick, cement, clay, coal, coke, commercial papers, cotton, cottonseed, hulls, cross ties, sewer pipe, currency, feed, fertilizer, flowers, fluorspar, fly ash, fresh meat, fruits and vegetables, grain, grass sod, gravel, hides, highway markers, heavy machinery, industrial alcohol, lime, logs, milk, cream, newspapers, oil well rigs, peat moss, pilings, posts, poultry, race horses, rock, salt, sand, sawdust, scrap iron, scrap steel, seed, stave bolts, stone, tanks, boilers, telegraph poles, telephone poles, tobacco, tobacco hogsheads, trees, shrubs, U.S. mail, parcel post, voting machines, water, wool, wrecked vehicles, cooperative associations, school busses and church busses. (Kentucky Revised Statutes Sec. 281.605, Sec. 281.011 and the Department of Motor Transportation Regulations 13-01 and 13-02)

Louisiana

Agricultural products, livestock, fish, shrimp, hotel vehicles, sightseeing vehicles, taxicabs, school busses, newspapers, funeral cars, ambulances, products of the forest, logs, moss, ties, stave bolts, shingles, pulpwood, rough lumber, sand, gravel, shells, cement, soil, clay and aggregates. (Louisiana Revised Statutes 45:172 and 45:162)

Maine

Seed, feed, fertilizer, livestock, agricultural products, fresh fruits, fresh vegetables, milk, cream, agricultural

cooperative associations, U.S. mail, newspapers, wood, pulpwod, logs and sawed lumber. (Maine Revised Statutes Chapter 48 Sec. 29)

Maryland

Farm products, school busses, milk to cooling stations, or freight platforms. (Maryland Code, Article 78 Section 32 (b).)

Massachusetts

School busses, U.S. mail. (Massachusetts General Laws, Chapter 159A, Section 11 (A) and Chapter 159B, Section 13.)

Michigan

Farm products, livestock, milk, fruits, green vegetables, sugar beets, U.S. mail, newspapers, dump trucks, pulpwood and logs. (Michigan Compiled Laws, Section 479.2)

Minnesota

Agricultural, dairy, livestock, farm products, agricultural coperative association, taxicabs, hotel vehicles, school busses, pulpwood, cordwood, mining timber, poles and posts. (Minnesota Statutes, Section 221.011.)

Mississippi

Farm products, fruit, livestock, poultry products, buttermilk, fresh milk, cream, butter, cheese, pecans, in shells, tung nuts, soy beans, small grains, soy bean meal, cotton, cotton seed, cotton seed meal, cotton seed hulls, agricultural and horticultural commodities, fertilizers, feed, insecticides, cooperatives, trolley busses, school busses, newspapers, U.S. mail, forest products, pulpwood, dressed lumber, naval stores, gravel, unmanufactured road building material, dry nitrates and religious busses. (Mississippi Code, Section 7635.)

Missouri

Livestock, farm products, dairy products, agricultural limestone, fertilizer, cooperatives, taxicabs, street railroads, school busses, U.S. mail, newspapers and vehicles with a gross weight of 6,000 pounds or less. (Missouri Statutes, Section 390.030, 390.031, 390.020)

Montana

Livestock, agricultural commodities, school busses, logging, mining operations and construction or maintenance of highways. (Montana Code, Section 8-101 and 8-123)

Nebraska

Ranch products, dairy products, farm products, livestock, trolley busses, school busses, religoius busses, newspapers, U.S. mails, ambulances, hearses, tow trucks. (Nebraska Statutes Section 75-224.)

Nevada

Livestock, farm products, school busses, U.S. mail, ore and mining supplies. (Nevada Statutes, Section 706.670)

New Hampshire

Agricultural cooperatives, taxicabs, hotel vehicles, school busses and U.S. mail. (New Hamp. R.S.A. Sections 375 and 376)

New Jersey

Taxicabs, hotel busses and school busses. New Jersey Statutes Section 48:4-1.)

New Mexico

Livestock, farm products, dairy products, hotel busses, taxicabs, school busses, U.S. mail, ambulances, hearses, funeral coaches, sand, gravel, rock, crushed rock, rock ballast and dirt. (New Mexico Statutes, Section 64-27-25 and Section 64-27-14)

New York

Fertilizers, soil conditioners, agricultural commodities, logs, pulpwood, milk, cream, fish, livestock, cooperative corporations, taxicabs, hotel busses, school busses, newspapers, sand, gravel, dirt, debris, road materials, ready mixed concrete, lime and limestone. (New York Public Service Law; Section 63-i (3) and Section 2 (28).)

North Carolina

Farm products, dairy products, orchard products, livestock, fish, cooperative associations, taxicabs, airport vehicles, hotel vehicles, trolley busses, newspapers, fire-

wood, logs, cross ties, stave bolts, pulpwood, rough lumber, insecticides, fungicides, sand, gravel, dirt, debris, paving materials, church busses and emergency vehicles. (North Carolina Statutes, Section 62-121.8 (a) and Section 62-121-47 (a).)

North Dakota

Farm products, school busses, rural mail carriers. (North Dakota Revised Code, Section 49-1802 and 49-1804.)

Ohio

Farm supplies, farm products, taxicabs and hotel busses. (Ohio R C Section 4921.02 (a) and Section 4923.-02 (A).)

Oklahoma

Livestock and farm products. (49 Oklahoma Statutes, Section 161 (b).)

Oregon

Farmer owned vehicles, fish scrap, taxicabs, school busses, U.S. mail, sand and gravel dump trucks, metallic ores or concentrates, logs, poles, piling, rough or planed lumber, towing vehicles ambulances, and hearses. (Oregon Revised Statutes Sections 767.030, 767.145, 767.035, 767.025, 767.425.)

Pennsylvania

Agricultural products, farm supplies, agricultural cooperative associations, school busses, towing vehicles, pulpwood, ambulances, hearses, and dump trucks. (Pennsylvania Statutes, Title 66 Section 1102.)

Rhode Island

Agricultural commodities, horticultural commodities, farm products, cooperative groups, U.S. mail, newspapers, garbage, ashes and debris. (Rhode Island Statutes Section 39-12-3)

South Carolina

Farmers, dairymen, perishable products, school busses, U.S. mails, lumber, logs, church busses, picnic and excursion vehicles. (South Carolina Code Sections 58-1402, 58-1404 and Regulations Rule 20.)

South Dakota

Agricultural and horticultural commodities, livestock, taxicabs, school busses, newspapers, vehicles used in construction or maintentance of highways. (South Dakota Code, Section 44.041 (9).)

Tennessee

Milk, milk products, perishable farm products, livestock, petroleum products when the owner of the vehicle is regularly engaged in such business, agricultural cooperative associations, taxicabs, school busses, ambulances, funeral vehicles and church vehicles. (Tennessee Code Section 65-1503 and Section 65,401)

Texas

Fresh fish. (Texas Civil Statutes, Article 911b, Section a (1) (e).)

Vermont

U.S. mail. (Vermont S.A. Title 30, Section 236.)

Virginia

Livestock, poultry, poultry products, buttermilk, fresh milk, cream, meats, butter, cheese, fish, cooperative associations, taxicabs, hotel vehicles, school busses, U.S. mail, newspapers, lumber, staves. (Virginia Code, Section 56-274)

Washington

Farmer vehicles, taxicabs, hotel busses, school busses, U.S. mail, newspapers, periodicals, towing vehicles, water, garbage and refuse. (R. C. Washington 81.80.040, 81.68.010, and 81.72.010)

West Virginia

Agricultural products, horticultural products, livestock, poultry, dairy products, agricultural or horticultural supplies, school busses, U.S. mail, newspapers, ambulances, excreta, coal (from mining operations to loading facilities for further shipment by rail or water carriers). (West Virginia Code Section 2577 (3).)

Wisconsin

Livestock, milk, farm products, farm supplies, taxicabs, U.S. mail, tow vehicles and emergency transportation (the movement of coal to a school or hospital dur-

ing an exceptionally cold period is emergency transportation where authorized carriers cannot perform the service.) (Wisconsin Statutes, Section 194.01, 194.05 and 194.34 and PSC 20.03, 20.04.)

Wyoming

Farmer and rancher vehicles, farm produce or commodities, school busses, U.S. mail, nonprofit educational tours, ambulances and hearses. (Wyoming Statutes, Section 37-134 and Regs. Rule 2)

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No. 238

In the Supreme Court of the United States

October Term, 1964

WYCOFF COMPANY, INCORPORATED, *Appellant*

v.

PUBLIC SERVICE COMMISSION OF UTAH, ET AL., *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

APPELLEE'S MOTION TO DISMISS THE APPEAL

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APPELLEE'S MOTION TO DISMISS THE APPEAL

MOTION

Appellee in the above entitled case moves to dismiss the appeal on the ground that the question presented is so unsubstantial as not to need further argument.

STATEMENT

Appellant in its Jurisdictional Statement correctly sets forth the opinions of the courts below, the jurisdiction of this court, the question presented, and the statute involved.

The Utah Motor Carrier Act, Volume 6, Sections 54-6-1 through 54-6-24, Utah Code Annotated 1953, as amended, provides for the regulation by the Public Service Commission of Utah of motor carriers for hire. Such carriers are divided into two classes, namely, common motor carriers and contract motor carriers. Section 54-6-1, Utah Code Annotated 1953, defines common motor carrier of property as follows (the definition of common motor carrier of passengers is the same, except that the term "passengers" is used instead of "property"):

> "'Common motor carrier of property' means any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place, the property of others who may choose to employ him."

And contract motor carrier of property is defined as follows (the definition of contract motor carrier of passengers is the same, except the term "passengers" is used instead of "property"):

> "'Contract motor carrier of property' means any person engaged in the transportation by motor vehicle of property for hire and not included in the term common motor carrier of property as hereinbefore defined."

Common motor carriers are required to obtain a certificate of convenience and necessity from the Public Service Commission and contract motor carriers are required to obtain a permit from the commission before they are permitted to do business. Motor carriers are not taxed

under the Utah Motor Carrier Act for their operation on the highways.

Section 54-6-12, Utah Code Annotated 1953, exempts certain motor carriers from a portion of the provisions of the Utah Motor Carrier Act. For the convenience of the court, this section is set out in full below with emphasis added to indicate exclusions:

> 54-6-12. "Except for the provisions of 54-6-17 relative to requirements of insurance, 54-6-21 relative to safety regulations, and 54-6-22 relative to accident report no portion of this act shall apply:
>
> "(a) To motor vehicles when engaged exclusively in transporting *students or their instructors* to or from school or to or from school activities, the word 'school' to be construed to mean a place or structure in which the annual winter or summer elementary,, collegiate, university or religious instruction is carried on; or
>
> "(b) To motor vehicles when used exclusively in carrying the *United States mail* under contract with the federal government or;
>
> "(c) To motor vehicles when the cargo consists exclusively of *livestock, farm, orchard, or dairy products* which are being transported between farm, orchard or dairy and a market, warehouse, creamery or processing plant; or exclusively of *farm or dairy supplies* used in or about the farm or dairy; or exclusively of *coal, lumber or logs* which are being transported from mine or forest to shipping point or market; or
>
> "(d) To motor vehicles when owned or operated by any duly organized *agriculture cooperat-*

ive association and used exclusively in the carrying on of its legally authorized non-profit activities; or

"(e) To motor vehicles used exclusively in the distribution of *newspapers* from the publisher to subscribers or distributors; or

"(f) To motor vehicles when especially constructed for *towing, wrecking, maintenance, or repair purposes,* and not otherwise used in transporting goods and merchandise for compensation; or when constructed as *armored cars* and used for safe conveyance or delivery of money or other valuables, or when used as *hearses, ambulances, or licensed taxicabs,* operating within a fifteen mile radius of the limits of any city or town; or to motor vehicles used as ambulances or hearses by any person, firm or corporation duly licensed in the state as an embalmer, funeral director, or as a mortuary establishment, provided that use of such motor vehicles as an ambulance shall be incidental to the use of embalming or funeral directing.

"(g) To a group of *employees riding together* in the automobile of a fellow employee to and from their employment and sharing the actual expenses of the transportation; provided that said group of employees shall not exceed 5 persons, in addition to the driver of the vehicle, and in no event to exceed 3 persons in any one seat, and provided further that this subsection shall not apply to any individual so operating in excess of one motor vehicle.

"It shall be unlawful for any vehicle which is operated under any of said exempt classes to be operated upon the public highways of this state, for hire, without a public liability policy in an amount not less than $20,000.00 for personal injuries to or death of one person, or less than $40,000.00 for injuries to or death of more than one person; and for

damage to property of any person other than the assured in an amount not less than $10,000.00 for liability arising out of the operation of said vehicle for hire; without maintaining said vehicle and all parts thereof in a safe condition at all times and without reporting every accident arising from or in connection with the operation of such vehicle as required by law or to be operated for any uses or purposes not falling within said exempt classes, except in accordance with the provisions of this act.

"The commission shall have power and authority to prescribe such reasonable rules and regulations to carry out the purposes of this act as may be deemed necessary including the establishing of reasonable fees for registration and each annual renewal thereof of exempt carriers and for the services performed by the commission.

"The commission is vested with power and authority and it shall be its duty to supervise and regulate all motor carriers as excepted above in accordance with these rules and regulations and with the provisions of this section and all carriers now operating under the provisions of this section shall make application to register their operation with the public service commission on or before July 1, 1957, and thereafter each carrier commencing operations under this section shall apply for registration as provided herein within 30 days immediately after said operation.

"A violation of this section or of the rules established pursuant thereto shall constitute an unlawful act and shall be punishable in the same manner and to the same extent as provided for in this act for non-exempt carriers."

The sole question presented to this court is whether or not the above exemptions discriminate against non-ex-

empt motor carriers to the extent that they are repugnant to Amendment XIV of the Constitution of the United States of America.

THE QUESTION IS SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.

The basis upon which appellee maintains that the question presented is so unsubstantial as to not need further argument, is that this court in previous decisions has decided the question and has upheld the constitutionality of other state laws containing exemptions almost identical with those in the Utah law.

Appellant relies principally upon this court's decision in *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, wherein the Florida Motor Carrier Act was held to be unconstitutional. That act completely excluded from regulation the following motor carrier operations:

> "• • • corporations or persons engaged exclusively in the transportation of children to or from school, or any transportation company engaged exclusively in the transporting agricultural, horticultural, dairy, or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point enroute to primary market or to motor vehicles used exclusively in transporting or delivering dairy products or any transportation company engaged in operating taxicabs, or hotel busses from a depot to a hotel in the same town or city." (283 U. S. page 557.)

There are important distinguishing features between the Utah Motor Carrier Act and the Florida statute as it

was at the time of the *Smith* v. *Cahoon* decision. They are as follows:

FLORIDA MOTOR CARRIER ACT AT TIME OF SMITH v. CAHOON

1. Statute made no distinction between a common carrier and a contract carrier. It required a tariff from every auto transportation company.

2. The exempt carriers were not required to give a bond or insurance policy for the protection of the public.

3. The exempt carriers were not bound by any safety regulations.

PRESENT UTAH MOTOR CARRIER ACT

1. Distinguishes between "common motor carrier of property" and "contract motor carrier of property." (Section 54-6-1, Utah Code Annotated 1953.)

2. Requires exempt carriers to furnish public liability insurance. (Section 54-6-12, Utah Code Annotated 1953, as amended by Chapter 107, Section 1, Laws of 1957.)

3. Requires exempt carriers to maintain vehicles in a safe condition (Section 54-6-12, Utah Code Annotated 1953, as amended by Chapter 107, Section 1, Laws of 1957) and to maintain safe conditions at all time and be subject to inspection by the commission. (Section 54-6-21 of Utah Code Annotated 1953.)

In *Smith* v. *Cahoon* the court first commented upon failure of the Florida statutes to distinguish between com-

mon carriers and a private or contract carrier such as Mr. Smith. 283 U. S. page 561. Under the Utah statutes, Smith would be a contract carrier. This failure of the Florida statutes to distinguish between common and contract carriers of property was one basis for the court's holding the Florida Act unconstitutional as the court said:

> "The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. * * * All carriers within the act, whether public or private, are put by the terms of the statute upon precisely the same footing. All must obtain certificates of public convenience and necessity upon like application and conditions. It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state." (L. 83, U. S., page 563.)

It is obvious that this basis for the decision in *Smith* v. *Cahoon* would not apply to the matter before the court. The Utah law distinguishes between common motor carriers and contract or private motor carriers and does not purport to subject all carriers to the same obligations, which would be beyond the power of the state.

The second basis for holding the Florida Act unconstitutional in *Smith* v. *Cahoon* was that of an unconstitutional discrimination. It appears to appellees that the rationale of the second objection was that there was no rea-

son to exempt any motor carriers conducting a business upon the highways from safety requirements. This was stated by the court as follows:

> "In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made'." (283 U. S., Page 567.)

The Utah Motor Carrier Act, as distinguished from the Florida Act, does not exempt any motor carrier for hire

insofar as public safety is concerned. The pertinent portion of Section 54-6-12, Utah Code Annotated 1953, provides:

> "Except for the provisions of Section 54-6-17, relative to requirements of insurance, 54-6-21 relative to safety regulations and 54-6-22, relative to accident report no portion of this act shall apply. * * *" (listed exemptions)

And Section 54-6-21, Utah Code Annotated 1953, provides:

> "Every motor vehicle and parts thereof shall be maintained in a safe condition at all times and shall be at all times subject to inspection by the commission or its duly authorized representatives."

And Section 54-6-22, Utah Code Annotated 1953, provides:

> "Every accident arising from or in connection with, the operation of any motor vehicle to which this act applies shall be reported to the commission in such detail and in such manner as the commission may require."

Furthermore, the Utah Motor Carrier Act does not remove the exempt carriers from the jurisdiction of the Public Service Commission. Section 54-6-12, Utah Code Annotated 1953, which is set out in full on pages 3, 4 and 5 of this motion provides that, in addition to safety and insurance requirements, the commission shall have authority to prescribe reasonable regulations to carry out the purposes of the act as it pertains to exempt motor carriers, that it shall be the duty of the commission to supervise and regulate exempt motor carriers, and that all exempt motor carriers shall register with the Public Service Commission.

Appellant, on page 7 of its Jurisdictional Statement, contends that the Utah Act is discriminatory because it does not require exempt carriers to obtain a certificate from the Public Service Commission. Under the Utah Act, a contract motor carrier is not required to obtain a "certificate" either—he must obtain a "permit". Exempt carriers obtain neither, but they are required to register with the commission. We think that the court in *Smith* v. *Cahoon* did not use the word "certificate" in any technical sense but that what the court said was that the legislature cannot relieve the exempt carriers from all control of the regulatory body and the requirements of safety and security, otherwise such a classification would have no relation to the purpose for which it was made. Under the Utah Act, the exempt carriers "register" with the Public Service Commission and are subject to such regulations as the commission may adopt. (Section 54-6-12, Utah Code Annotated 1953.)

From the foregoing, it appears that the Utah Motor Carrier Act is clearly distinguishable from the Florida Act which was under consideration in *Smith* v. *Cahoon* and that it contains none of the features the court found objectionable in *Smith* v. *Cahoon*.

It is interesting to note that following the *Smith* v. *Cahoon* decision the Florida Motor Carrier Act was amended and provisions relating to safety and security for the exempt carriers were added. The constitutionality of the act was again drawn in question on the ground that

the exemptions were discriminatory and the Florida Supreme Court found the act constitutional. *Riley* v. *Lawson*, 106 Fla. 521, 143 So. 619.

Without reciting from each of the several cases subsequent to the *Smith* v. *Cahoon* decision in which this court has upheld the constitutionality of exemptions similar to those in the Utah Motor Carrier Act, and with which this court is familiar, the following quotation from *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission et al.*, 295 U. S. 285, 79 L. Ed. 1439, is an appropriate summary:

> "*Smith* v. *Cahoon* has been considered in later cases in this court, and the limits of its holding, clear enough at the beginning, have been brought out in sharp relief. Thus, in *Continental Baking Co.* v. *Woodring*, supra, at p. 371, (286 U. S. 371, 76 L. Ed. 1166, 52 S. Ct. 595, 81 A. L. R. 1402) which came here from the State of Kansas, exemption from various forms of regulation, including the payment of a tax, was accorded to 'the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle.' The exemtpion was upheld. Again, in *Hicklin* v. *Covey*, supra, at p. 175, (290 U. S. 175, 78 L. Ed. 251, 54 S. Ct. 142) a statute of South Carolina gave exemption to 'farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points.' The exemption was interpreted by the highest court of the state as limited to cases where the hauling was irregular or occasional and not as a regular business. We upheld the statute as thus interpreted though the effect was to relieve from the filing of a bond.

> "These cases and others like them (*American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43) are illustrations of the familiar doctrine that a legislature has a wide discretion in the classification of trades and occupations for the purpose of taxation and in the allowance of exemptions and deductions within reasonable limits."

In addition to the cases cited in the above quotation, also see *Sproles* v. *Binford*, 286 U. S. 374, 391, 394, 76 L. Ed. 1167.

In *McGowan* v. *Maryland*, 366 U. S. 420, 425; 6 L. Ed. 2d 393, 399, this court said in sustaining classifications under the Sunday Closing Law of the State of Maryland:

> "* * * Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. * * *"

The exemption of certain motor carriers from portions of the Utah Motor Carrier Act is consonent with the purposes and objectives of the act. As was stated by the Utah Supreme Court in the last paragraph of its judgment in this case (15 Utah 2d 139, 389 P. 2d 57, 60):

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> "We have given careful consideration to classes of transportation exempted under 54-6-12 and conclude that in each instance the classification is reasonable. For the most part, the transportation exempted is casual, seasonal, slow-moving, not on regular routes or schedules, frequently in special equipment, and for comparatively short distances. Each of the exemptions have been held reasonable by other courts."

At one time or another, practically all of the exemptions found in the Utah Motor Carrier Act have been sustained by the courts of other states. Appendix A of this motion lists such decisions.

CONCLUSION

The question presented by the appeal in this matter is so unsubstantial as to not need further argument and the appeal should be dismissed.

Respectfully submitted,

A. PRATT KESLER,
Attorney General,

H. WRIGHT VOLKER,
Assistant Attorney General,

KEITH E. SOHM,
Commerce Attorney,

Attorneys for Public Service Commission of Utah and its Commissioners.

APPENDIX A

CASES IN WHICH EXEMPTIONS SIMILAR TO THOSE IN THE UTAH MOTOR CARRIER ACT HAVE BEEN SUSTAINED.

Transportation of Children and Instructors to School:

Continental Baking Co. v. Woodring, 286 U. S. 352, 76 L. Ed. 1155

Ex Parte Iratacable, 55 Nev. 263, 30 P. 2d 284

Riley v. Lawson, 106 Fla. 521, 143 So. 619

Kelly v. Finney, 207 Ind. 557, 194 N. E. 157

Vehicles Carrying United States Mail:

Kelly v. Finney, supra

Public Service Commission of Wyoming v. Grimshaw, 53 P. 2d 1, 109 A. L. R. 534

Vehicles Transporting Livestock and Farm Dairy Products:

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285, 29 L. Ed. 1439

Schwartzman Service v. Stahl (Mo. 1932), 60 F. 2d 1034

Figenshaw v. McCoy (N. D.), 256 N. W. 259

State, ex rel. Wisconsin Allied Truck Owners Association v. Public Service Commission, 207 Wis. 664, 242 N. W. 668

Riley v. Lawson, supra

Vehicles Transporting Logs:

Hicklin v. Covey, 290 U. S. 169, 78 L. Ed. 247

Anderson v. Thomas, Commissioner of Public Utilities, (Ore.), 26 P. 2d 60

State v. King (Me.), 188 A. 775

Vehicles Operated by Agriculture Cooperative Associations:

Kelly v. Finney, supra

Baker v. Glenn, State Tax Commissioner of Kentucky, 2 F. Supp. 880

Vehicles Used in Exclusive Transportation of Newspapers:

Kelly v. Finney, supra

Schwartzman Service v. Stahl, supra

State v. King, supra

Hearses, Ambulances, Taxicabs:

Ex Parte Iratacable, supra

Bacon Service Corporation v. Huss, 199 Cal. 21, 248 P. 235

PROOF OF SERVICE

I, A. Pratt Kesler, Attorney General of the State of Utal., Attorney for Public Service Commission of Utah and its Commissioners, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25 day of July, 1964, I served copies of the foregoing Motion to Dismiss on behalf of Appellees on the several parties thereto, as follows:

1. On Wycoff Company, Incorporated, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to Wayne C. Durham, its Attorney, 428 American Oil Building, Salt Lake City, Utah.

2. On the Utah Motor Transport Association, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to Richards, Bird and Hart, its attorneys, 716 Newhouse Building, Salt Lake City, Utah.

A. Pratt Kesler

A. PRATT KESLER,
Attorney General.

236 State Capitol
Salt Lake City, Utah

Office-Supreme Court, U.S.
FILED
SEP 8 1964
JOHN F. DAVIS, CLERK

No. 238

In the Supreme Court of the United States

OCTOBER TERM, 1964

WYCOFF COMPANY, INCORPORATED, APPELLANT

v.

PUBLIC SERVICE COMMISSION OF UTAH, ET AL.
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS

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At Page 7 of their Motion to Dismiss, appellees oversimplify how the present Utah Motor Carrier Act is to be distinguished from the Florida Motor Carrier Act at the time of *Smith v. Cahoon*, 283 U.S. 553, 75 L. Ed. 1264. No mention is made of the fact that both at the time of said Florida Motor Carrier Act and under the present Utah Motor Carrier Act, *exempt* motor carriers do not (and *regulated carriers* do) have to obtain certificates or permits of authority from; and be regulated by a Public Service Commission. The consequences of this discrimination have already been adequately treated in the Jurisdictional Statement (J.S. 6-7). This discrimination against regulated carriers by reason of the statutory requirement of *certificates* for appellant and other common carriers (or of *permits* for contract carriers) is made apparent by supplying the remainder of the quotation from *Smith v. Cahoon* set forth on Page 8 of appellees' Motion to Dismiss:

> "The statute on its face makes no distinction between common carriers and a private carrier such as the appellant. It applies, without any stated exception, to every auto transportation company within the statutory definition, and this admittedly included the appellant. It not only required an *application for a certificate of public convenience and necessity* but that this should be accompanied by a *schedule of tariffs*, and no such certificate was to be valid without the giving of *a bond* by the applicant for the protection both of the public against injuries and of the persons or property carried. The state commission was explicitly vested with authority to supervise 'every' auto transportation company that was embraced within the definition, to *fix or approve its rates and charges*, to *regulate its service*, to prescribe its *method of keeping accounts* which should set up *adequate depreciation charges*, and generally *to make rules governing its operations. Schedules of rates* of 'every such auto transportation company' were to be open to the public and all *alterations in tariffs* were to be subject to the commission's control." (283 U.S. 562-563, 75 L.Ed. 1272. Emphasis supplied).

The foregoing quotation also has application to the argument made at Page 11 of appellees' Motion to Dismiss that no unconstitutional discrimination exists as long as exempt carriers are subject to some control by the regulatory body. It must be remembered that any regulation by the Public Service Commission of "exempt carriers,"[1] is limited to insurance requirements, safety regulations and accident reports (ibid). Further, any regulations that may be issued by the commission are limited by virtue of the third-from-the-last paragraph of said 54-6-12 (J.S., App. B, p 14a-15a) to those which would "carry out the purposes of this act"; and, as noted, the act specifically excludes ("no portion of this act shall apply") any regulation except as to matters of insurance, safety regulations, and making accident reports.

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[1] So described in 54-6-72, J.S., App. B, p. 130; but note that 54-6-1's definition of "contract motor carrier" by inclusion of all except common motor carriers would of necessity include exempt carriers.

None of the cases cited by appellees are controlling and all have been distinguished both in our brief below to the Utah Supreme Court and in the Jurisdictional Statement at pages 7-8. The State Supreme Court decisions cited by appellees should be given no more weight than the instant decision below.

Perhaps the distinction most worthy of note in the cases relied upon by the appellees are those involving exemptions from tax statutes.[2] Such cases have no application to this case because no tax is involved. *Aero Mayflower Transit Company v. Georgia Public Service Commission*, et al. 295 U.S. 285, 79 L. Ed 1439, 1445, quoted on pages 12 and 13 of appellee's Motion to Dismiss, stops too soon. The opinion continues after the excerpt there reproduced:

> "Be that as it may, exemption from a tax stands upon a different footing, though the purpose of the tax is the upkeep of the highway. At such times the legislature may go far in apportioning and classifying to the end that public burdens may be distributed in accordance with its own conception of policy and justice. If its action be not arbitrary, the courts will stand aloof."

Smith v. Cahoon was followed recently in *Morey v. Doud*, 354 U.S. 457, 1 L. Ed. 2d 1485, 1491, where the Illinois Community Currency Exchanges act required a state license for those issuing money orders; but the American Express Company was excepted from the provisions of the act, and the Court stated:

> "* * * the act (in *Smith v. Cahoon*) excepted motor vehicles carrying specified products. This Court held that the exception violated the Equal Protection Clause since the statutory purpose of protecting the public did not reasonably support a discrimination between

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[2] e.g., *Continental Baking Company v. Woodring*, 286 U.S. 352, 76 L.Ed. 1155; *Hicklin v. Coney*, 290 U.S. 169, 78 L.Ed. 247; *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U.S. 285, 79 L.Ed. 1439; *Sproles v. Binford*, 286 U.S. 374, 76 L.Ed. 1167.

> the carrying of exempt products like farm produce and of regulated products like groceries. 'Such a classification is not based on anything having relation to the purpose for which it is made. Ibid 283 U.S. 567."

The Utah Motor Carrier act similarly creates an unlawful discrimination between exempt and nonexempt carriers that causes said act to be unconstitutional under the Equal Protection Clause.

Respectfully submitted,

WAYNE C. DURHAM
Attorney for Wycoff Company, Incorporated

September, 1964

PROOF OF SERVICE

I, Wayne C. Durham, Attorney for Wycoff Company, Incorporated, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of September, 1964, I served copies of the foregoing *Brief for the Appellant in Opposition to the Motion to Dismiss* on the several parties thereto, as follows:

On Public Service Commission of Utah, Hal S. Bennett, Donald Hacking and Raymond W. Gee, its Commissioners, by mailing a copy in a duly addressed envelope, with first-class postage prepaid, to A. Pratt Kesler, Esquire, Attorney General, and H. Wright Volker, Esquire, Assistant Attorney General, State Capitol, Salt Lake City, Utah; and to Keith E. Sohm, Esquire, Commerce Attorney, Public Service Commission, State Capitol, Salt Lake City, Utah.

WAYNE C. DURHAM, *Attorney for Appellant*
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